Central Law Journal.

ST. LOUIS, MO., JANUARY 6, 1911

SOMETHING FOR THE NEW YEAR—SOME DEFINITE REFORM IN PROCEDURE.

The new year brings with it many very important issues, not the least of which is that suggested in President Taft's recent message to Congress, to-wit, some definite reform in procedure.

There is no doubt but that there is no other question connected with the administration of law that so constantly agitates the mind of the people. Fed by the chaff of aimless argument on the part of political agitators, the public conception of what might be a real impediment to the course of justice is often magnified into a Himalayan range of so-called technicalities that are impassable save only to those able to command great wealth or influence.

As a matter of fact, every lawyer of experience stands ready to prove the assertion that, excepting rare cases, justice is quite accurately administered in this country and that the only objection to present methods is not that they deny justice, but that they often delay the relief sought or are otherwise cumbrous and unscientific.

No lawyer ever contended that the law as it had arrived in his hands was perfect; his only concern is that he may hand it on to future generations a little better than he found it. And to this, procedure is no exception. Read the history of this branch of the law and observe the great strides it has made from the obscurity and superstition of barbaric practice to the present enlightened system, which, in spite of its existing imperfections, is the best system in the world so far devised.

No right thinking jurist or experienced practitioner will approve any wholesale condemnation of the present system or any violent uprooting of it that there may be transplanted in its place the exotic product of some idealistic dreamer. And this is true whether such suggestion come from within or without the profession.

The injunction to "prove all things, hold fast that which is good," applies with particular emphasis to every reform or advance in the law. We shall, therefore, in a campaign which we shall undertake this year, for some definite reform in legal procedure, keep in view constantly those great fundamental principles already established and from which it would be fatal to depart and to suggest such modification in their administration as to more quickly effectuate their ultimate and sole purpose,—not to hinder or delay justice, but to make it first, exact; second, prompt; third, inexpensive,

Much of the confusion that surrounds all campaigns for reforms in procedure is that both the lay and professional reformer so frequently charge pell mell in a quixotic attack on a phantastic windmill, which they term, "technicality" without ever pausing to explain how any rule of procedure can be other than technical and without classifying their so-called "technicalities" so that the mind might approach them one at a time and determine calmly whether we can better things by changing the rule attacked or by abrogating it entirely. It is, therefore, very clear that nothing can come of any wholesale denunciation of technicalities; that the only contribution of value must be in the nature of a bill of particulars, in which the writer shall discard invective for reason and generalities and platitudes for clear and definite suggestions based upon experience and approving themselves to lawyers and judges engaged in the active practice of the law.

Suppose, for the sake of convenience, that we subdivide the subject of procedure into five parts. First, courts of justice, their organization and jurisdiction. Second, pleading, by which a case is brought into a court, including all the usual motions that go to perfect the statement of the cause of action and to bring the case to trial. Third, jury and jury trials, that peculiar Anglo-Saxon institu-

tion by which we determine the existence or non-existence of facts. Fourth, evidence, the rules by which we determine the character of proof offered to establish any particular fact. Fifth, appeals and appellate procedure, that system by which we transfer a cause from one court to a higher court for purposes of review and correction of errors. Now, if a cry against "technicalities" is raised, let us insist that the party shall classify his suggestion as falling within one or the other of these four classes so that the fury of the attack shall not reflect on any of the other subdivisions but shall strike directly and intelligently at the rule, or application thereof, which is charged with defeating what we have termed the ultimate purpose of all rules of procedure, to-wit, that justice shall be exact, prompt and cheap.

Now we shall take up a few instances. Shall the first pleading be regarded as simply giving notice to the defendant or shall we dignify it as being the foundation of the cause of action and as constituting the credentials without which no court can acquire jurisdiction. In the first alternative, departures and variances and even the failure to state a cause of action would not be regarded if sufficient notice or a continuance is allowed the defendant, and a plaintiff, therefore, if he showed a good cause of action in the evidence which he submitted on the trial, would be allowed to recover. In the second alternative, a plaintiff showing a just and clear cause of action on the trial would be non-suited if he had stated a different one, or none at all, in his pleadings. Why cannot the profession discuss this single question without drifting, as is so frequently the case, into general and extravagant condemnation of "technicalities of procedure." Surely this question has nothing in common with the question whether a case should fail of review on appeal because the bill of exceptions was not properly executed or signed, or with the question whether a case should be reversed because of the probably immaterial testimony of an incompetent witness. All of these other questions belong to different subdivisions and do not rest on the same reasons for their existence and therefore cannot be properly included in any one broadside against "technicalities."

In this campaign which we shall undertake during this year, we shall call upon the greatest experts of the profession to enlighten us with their views on these particular questions. For this purpose we have appointed the Hon. Thomas W. Shelton, of Norfolk, Va., as one of our associate editors, and shall look to him to lead the discussion on this very important issue and to classify the results with the purpose in view that they shall ultimately take some definite shape. Mr. Shelton is a member of the Committee on Reform in Procedure of the National Civic Federation and represented that committee in a joint meeting with a similar committee of the American Bar Association, at the recent meeting of the Association at Chattanooga. It is through these two powerful and influential organizations that this reform must come, and the aid of the CENTRAL LAW JOURNAL having been requested, and at once given, we offer the profession the influence of these columns for a general discussion of this important subject.

We have requested contributions on this subject from President Taft, Mr. Frederick W. Lehmann, Solicitor General of the United States; Judge Alton B. Parker, Hon. Everett P. Wheeler, of New York; Prof. Roscoe Pound, of Harvard University; Mr. Walter G. Smith, of Philadelphia; Judge Selden P. Spencer, of St. Louis; Judge Thomas A. Sherwood, of Long Beach, California; Mr. Edward D'Arcy, of St. Louis; Prof. Alexander A. Bruce, of Grand Forks, South Dakota; Justice John M. Harlan, and Hon. Edgar H. Farrar, of New Orleans, President of the American Bar Association. In addition to these we shall welcome short definite suggestions from any judge, active practitioner or from the deans and faculties of our various law schools. Surely from such a

broad discussion of this very important subject we may confidently expect large and beneficial results.

From time to time we shall offer certain propositions to the profession for their approval or rejection, the votes to be submitted to a committee of tellers of recognized standing in the profession. We are sure that the profession will respond to this program in order that the consensus of professional opinion may be clearly indicated. A professional referendum has never been attempted except locally, or on some very minor issue, but those really great men of our profession whom we may properly designate as "constructive jurists" have often remarked upon the importance of such a referendum in order that every reform or scheme of codification about to be launched might go forth not only with the outward expression of the approval of the profession through its duly constituted authorities, but that it might have such approval supported by a vote of confidence from the rank and file of the profession.

We should welcome expressions of approval or of objection from the profession as to any feature of this plan or any suggestions by which the plan might become more effective.

NOTES OF IMPORTANT DECISIONS

JURISDICTION—DISMISSAL UPON DEMURRER AS TO ONE DEFENDANT WHERE APPELLATE COURT HELD CAUSE WRONGLY REMOVED.—Justice Hughes in the second opinion handed down by him from the Supreme Court holds, with the concurrence of the other judges, that, where on appeal from a circuit court it is decided that the cause was not a separable controversy which gave ground for removal, and motion for remand was, therefore, wrongly denied, yet a judgment upon demurrer dismissing the action as to one of the defendants was not a nullity as being rendered without jurisdiction. In re Metropolitan Trust Co., 31 Sup. Ct. 18.

The justice said: "The decree (of dismissal) cannot be so regarded unless the court, upon the motion to remand, was without jurisdiction to determine whether a separable controversy existed, and hence not merely committed an error, but exceeded its authority. The decree was not a nullity unless the order refusing to remand was a nullity and the latter contention was negatived by the decision of this court upon the application for a mandamus, in re Politz, 206 U. S. 323. The reversal by the circuit court of appeals of the final decree as to the other defendants, and its direction to remand, did not make the decision of the court of first instance any the less a judicial act and within the scope of its jurisdiction and discretion; and as that reversal and direction did not affect the trust company (defendant in whose favor was decree of dismissal) the decree in its favor remained in full force."

It is clear, that, if the decree or order on demurrer was a judicial act, the court below had no jurisdiction to vacate it after the term had elapsed, and it seems also clear that, if it was not a judicial act, there was no strict need in attempting to vacate it, because there was nothing to vacate. In either event it is a little difficult to see why the trust company should have been troubling itself about getting out a writ of prohibition against the lower court or why the Supreme Court should have granted one. If there was no judicial act in the first instance, there was nothing to bother about If there was primarily a judicial act and, secondarily, after the term, there could be no judicial act in reference to a judicial act during the term, why should the supreme court level a writ of prohibition against an utterly abortive thing? It granted the writ. Against what?

But is it a fair deduction from the Politz case to say, because there is jurisdiction to pass upon a motion to remand for want of jurisdiction to retain, that, when wrong retention has been adjudged, it does not utterly nullify any and everything in the form of a judgment that succeeded, whether excepted to or not?

When the court, in the case considered, adjudged it would not remand, because it thought it had jurisdiction, its decision did not actually create jurisdiction. It merely had the power to attempt to proceed upon the supposition that its view as to jurisdiction was correct. It is not the claim of jurisdiction which gives a court the right to adjudge. It is the existence of jurisdiction that does this.

We have always thought, that there was no more conclusive way of showing that a judgment should be held for naught and making it assailable wherever it showed its head, than to demonstrate that the court was without jurisdiction to render it; but here we find a merely casual tribunal rendering a judgment, when it was actually without jurisdiction, and that judgment deemed valid, because the court rendering the judgment had authority to listen to

an objection to its jurisdiction, and wrongly decided the question.

We seem also to have heard, that consent of parties cannot invest any court with jurisdiction when the subject-matter of an action does not come therein. We doubt whether the new justice has made a very happy beginning of his judicial career. In the case Justice Hughes considered the circuit court no more had jurisdiction because it thought it had, than Dr. Cook was at the pole, because he thought he was, if he did so think.

CRIMINAL LAW — ADMISSIBILITY OF EVIDENCE OF OTHER CRIMINAL ACTS.—English law journals are much exercised over the recent decision of the Court of Criminal Appeal in Rex v. Ball (Weekly Notes 1910, p. 233.)

This case came before the Court of Criminal Appeal as an appeal from the conviction of a brother and sister for an offense under the recent Punishment of Incest Act, 1908. The dates of the unlawful carnal knowledge were laid as "on a date between the 1st and 14th of July, 1910, and on the 20th of September, 1910." Evidence was given of the appellants having lived together at these dates and having with them a child of about two and a half years old. Further evidence was then tendered, and after objection admitted, to the effect that in November, 1907, the appellants had moved to a house and lived there as a married couple for sixteen months, and that in March, 1908, a child was born and was registered as their child. The appellants were convicted, and now appealed on the ground that the evidence objected to was inadmissible. The Court of Criminal Appeal held that the evidence was not admissible and quashed the conviction.

The decisions of our own courts have been equally confusing, and we believe the recent declarations of the two well considered cases cited above will greatly assist the courts of our own country in arriving at a right conclusion in each case.

The question in every case is not—Does the evidence of other crimes go to show that the defendant committed the crime charged. If that is all it tends to prove, it is inadmissible. If, however, the evidence of the commission of other criminal acts tends to prove a collateral fact, which fact being established tends to prove the commission of the crime charged, then the proof of such other offense is admissible, in the language of Lord Alverstone, not because, but notwithstanding it proves that the prisoner has committed another offense.

Thus, if the proof of other offenses tends to prove malice, criminal intent, a conspiracy or a system of crime and where all or any of such facts when proven would be relevant to prove the offense charged, such evidence is clearly admissible.

Thus in a trial for murder, it could not be proven that the defendant killed another man some time before, merely to show that he was free with his gun. But suppose the deceased was a negro and the prosecution desired to show that defendant belonged to a gang that had pledged themselves "to kill every negro in the county," in proof of such a system of crime, the state could prove the killing of other negroes as a part of such general scheme.

The question, if a difficult one, should be turned around and viewed negatively. Does the offer of evidence of other crimes tend to prove merely that the defendant was a bad man. Does it merely fasten on him a reputation as a "dangerous character" or as having a quick temper, or as being free with fire arms, or as being a "lewd fellow," or as being a "tough character," from whom something like that should be expected. If this is all it tends to prove, it should promptly be rejected. A defendant should not have the burden of disproving crimes of which he is not charged or embarrassed by the hauling out of old skeletons long since buried.

If, however, the evidence of other crimes proves more than that just indicated, the further question should be asked: "What fact does such proof establish, other than the mere commission of the act, and is such fact thus proven relevant to prove the offense charged?"

Of the many English decisions cited by our London contemporaries on the question of the admissibility of evidence of criminal acts other than those alleged in the indictment, two—the most recent—may be cited, i. e., Rex v. Wyatt (1904, 1 K. B. 188) and Rex v. Fisher (1910, 1 K. B. 149). In the first mentioned (a decision of the Court for Crown Cases Reserved) evidence of other criminal acts was held to have been rightly admitted; in the latter (a decision of the Court of Criminal Appeal) the evidence was held to be inadmissible. In Rex v. Wyatt, Lord Alverstone quoted from the Privy Council's judgment in Makin v. Attorney-General (supra) the following passage: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely,

from his criminal conduct or character, to have committed the offense for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmis ible, if it be relevant to an issue before the jury, and it may be so relevant, if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defense which would otherwise be open to the accused." In Rex v. Fisher, the judgment of Channell, J., (to which Lord Alverstone was a party), contains the following passage: "* * * if the evidence of other offenses does go to prove that he did commit the offense charged, it is admissible because it is relevant to the issue, and it is admissible, not because, but notwithstanding that, it proves that the prisoner has committed another offense."

The Solicitors' Journal (London) speaking of the above quotations has this to say: "These two passages place the principle governing the admissibility of this kind of evidence in a very clear light, and on the principle as thus laid down it seems justifiable to entertain grave doubts as to the correctness of the decision in Rex v. Ball. The point is certainly sufficiently doubtful, and sufficiently important, for a further review by the House of Lords, if that is now possible."

CONTRACT—VALIDITY OF AGREEMENT BETWEEN EMPLOYERS AND TRADE UNIONS THAT THE FORMER WILL NOT EMPLOY NON-UNION LABOR.—The right of labor to organize for its own benefit has, in gengeneral expression, been recognized. How far, however, it, as organized, or employers with it, may validly contract in the securing of preferential employment for union labor came, to the extent at least of what was involved in a particular contract, before the New York Court of Appeals in the case of Kissam v. United States Printing Co. et al., 92 N. E. 214.

There it was held that a contract between employer and trades unions prohibiting the ememployment of non-union workmen is not invalid as to such workmen, where it results in great benefit to the employer, disposes of differences between him and labor unions, is not entered into with malice against the non-union workmen nor with intent to injure them and where it is not sought to compel them to join the union.

This ruling was based upon findings of facts showing the presence of all of the above conditions. Whether or not the affirmative ingredients of the above statement would have sufficed may be only surmised. Generally in a contract one's undisclosed animus towards third parties should not affect its validity, provided the contract does not partake of conspiracy against the third parties, or, rather, where such is not its aim. If contracts of the character passed upon have the necessary tendency to injure non-union men or compel them to join the union, it might be said that specific intent as to such effect may be conclusively presumed.

Therefore, if we take it that the negative findings were unimportant, the question arises, whether in the case decided by New York Court of Appeals freedom of contract would be unlawfully infringed in saying that employers and trades unions shall not contract as they did, where each is merely concerned in seeking his respective interest.

It is admissible, in the strife of competition, for purchasers and sellers of commodities to urge their advantages in arrangements to steadily dispose of, or supply without friction or mischance articles of contract. This is often often a controlling consideration in the making of contracts. The guarantee that a purchaser will take, or that a seller will supply, the commodity in a series of sales is looked at from many angles—chiefly the probable ability arising out of what is collateral to such a contract to comply with its terms. Labor is a commodity and the spirit of modern legislation and decision so recognize it.

CONTEMPT IN FEDERAL COURTS.

One guilty of criminal contempt of a federal court may be removed for the purpose of trial and punishment from any district in which he may be found, to the district in which he has committed the contempt; but there can be no such removal for the purpose of merely enforcing obedience to the court's order in a civil proceeding.

It is indeed remarkable that at this late day there should still be doubt and obscurity as to what kinds of contempt constitute crimes against the United States under Sec. 1014 of Revised Statutes, so as to allow those guilty to be removed from one district to another, and also that the authorities should be so meager as to the methods of apprehending such persons and the procedure generally in such cases.

The first thing to be considered in dealing with this question is what are the classes into which contempts are divided and what are the reasons and causes of these divisions.

Contempts are of two kinds, criminal and civil, and with reference to this distinction the court in the case of *In re Nevitt*,[1] aptly expresses itself as follows: "The former (criminal) are conducted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders. The latter (civil) are instituted to protect, preserve and enforce the rights of private parties, and to compel obedience of the orders, judgments and decrees of the courts made to enforce the rights and remedies to which the courts have decided that such parties are lawfully entitled."

It may be further said that all contempts which involve purely the question of *punishment* for some disobedience to an order or some indignity or slight put upon a court as distinguished from a mere imprisonment to *enforce* obedience to an order in a civil case, are criminal, whereas, a civil contempt consists only of refusal by a person to do an act which the court has ordered him to do for the benefit of a party in a suit pending before it, and if he is committed until he complies with the order such commitment is in the nature of an execution to enforce the judgment of the court. The final test seems to be, who is the real party interested in the contempt proceeding; to whose advantage will it most redound? If it is solely to maintain the dignity and the power of the state and its courts, the contempt is criminal in its nature. But if some private party is primarily interested in its outcome, as when the defendant in an injunction suit is imprisoned until he obeys the order of court, then the contempt is civil.[2]

The power of the national courts to punish for contempt and to compel obedience of their orders is derived from Section 1, Article 3, of the Constitution, which provides that "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish."[3] In order that there shall be no misunderstanding or misconstruction of this provision, congress has passed an act, Sec. 725 of Revised Statutes, which specifically confers the power upon the federal courts to punish contempt of their authority and restricts such power to certain classes of cases.

It is axiomatic and is a canon of the common law that only the court whose order is disobeyed can punish for the contempt.[4] The fact that this is the case immediately opens up the complex question of removal or extradition; in the state courts from one state to another, and in the federal courts from one federal district to another federal district.

Perhaps nothing in federal procedure is more uncertain or more shrouded in obscurity than the question of removal for contempt of court. In fact the authorities on this and ancillary propositions are so few and indecisive that it can hardly be said that anything except the main principle that there is removal for criminal contempt, can be regarded as well settled. The whole authority for such removal is conferred by Sec. 1014, of Revised Statutes, which provides that "for any crime or offense against the United States" the offender may, by any judge of the United States, be arrested and imprisoned, or bailed "for trial before such court of the United States, as by law has cognizance of the offense." And it further provides that "when any offender or witness is committed in any district other than that *where the offense is to be tried*, it shall be the duty of the district judge of the district where such offender or witness is imprisoned, seasonably to issue, and the marshal

(1) 117 Fed. 448.

(2) Wasserman v. U. S., 161 Fed. 722; Bessette v. Conkey 194 U. S. 324, 48 L. Ed. 997; Hunze v. Butte Mining Co., 129 Fed. 274.

(3) In re Nevitt, supra.

(4) City of New Orleans v. New York S. S. Co., 20 Wall. 387, 393, 22 L. Ed. 354; in re Debs, 158 U. S. 564, 39 L. Ed. 1092; in re Nevitt, 117 Fed. 448.

to execute, a warrant for his removal to the district *where the trial is to be had.*" At a glance this may seem comparatively simple as to the method of apprehension and removal, but a close study of the few adjudged cases will reveal considerable vagueness and uncertainty.[5]

That a criminal contempt is an offense against the United States under Section 1014 of Revised Statutes, supra, has been repeatedly held.[6] It has also been held that a person cannot be removed under Section 1014 for any other purpose than trial.[7]

The first proposition with regard to removal for contempt of court and the one which seems to be conclusively settled, although the decided cases are few, is that, one guilty of *criminal* contempt may be brought from another district and punished. In the early case of Fanshawe v. Tracy,[8] the court without laying down any rule to be followed, says: "I do not see why, if a man is imprisoned for a contempt of a court of the United States, and breaks jail and escapes into another state, he cannot be arrested and returned to his imprisonment under the authority of the United States." Of course, this is not decisive of anything, and only goes to prove how unsettled the procedure in this regard was at that time. The strongest case yet decided is that of In re Ellerbe,[9] in which the contempt consisted of refusal to obey a subpoena. It was there held that when such witness, after failing to obey the subpoena, which had been duly served upon him, had been ordered arrested by the court of which he was in contempt, but had fled into another district, he could be arrested and removed by order of any judge having jurisdiction in the district where he might be found.

The only other decision holding directly on this point is that of In re Manning,[10] which declares that an officer of a court may be brought from another district and punished for contempt.

In the above authorities the question of criminal contempt is alone involved, and it yet remains to be seen what has been held to be the rule in similar circumstances when the contempt is civil. The lone case so far decided on this point is that of In re Graves.[11] This was a case in which a defendant refused to obey a money decree and fled the district. Thereupon removal proceedings were instituted and the court of the district in which he had sought sanctuary declined to order his removal, assigning as a reason that this was civil and not criminal contempt. The court at some length distinguishes the two kinds of contempt and the difference between this case and In re Ellerbe, supra, holding that the latter is purely punitive, while the former is remedial, executive and for the advantage of a private party. The court bases its refusal on the ground that removal under Section 1014 must be for purpose of trial and not to enforce an order already made, which would be aiding the prevailing party in the civil suit in his effort to coerce the loser into obeying the order made for the payment of money. But on the other hand, if in this very case the object of the contempt proceeding was to *punish* for willful disobedience of the decree and not to imprison and compel obedience, we would have an instance of criminal contempt and the offender could be proceeded against criminally; "in which case he is charged with the offense, and, being put upon trial, he may be convicted, and be punished by fine or imprisonment or both. In the latter case, the punishment is for

(5) Aaron v. U. S., 155 Fed. 833; in re Christian, 82 Fed. 888; American Co. v. Jacksonville Ry., 52 Fed. 937; in re Beshears, 79 Fed. 70; Fischer v. Hayes, 6 Fed. 63; United States ex rel. Southern Express Co. v. Memphis & Little Rock R. R. Co., 6 Fed. 237.

(6) In re Ellerbe, 13 Fed. 530; in re Acker, 66 Fed. 290; Castner v. Pocahontas Co., 117 Fed. 184.

(7) In re Graves, 29 Fed. 60; in re Christian, 82 Fed. 888; Horner v. United States, 143 U. S. 207, 36 L. Ed. 126; Rose on Federal Procedure, Sec. 1537.

(8) 4 Biss. 497, Fed. Cas. No. 4643.

(9) 13 Fed. 350.

(10) 44 Fed. 275.

(11) 29 Fed. 60.

an offense against the government." In such case, however, the extent of the punishment must be fixed when sentence is pronounced.

W. S. BARRETT.

Houston, Texas.

FOREIGN JUDGMENT—MERGER.

SWIFT et al. v. DAVID.

Circuit Court of Appeals, Ninth Circuit.

181 Fed. 828.

A judgment in personam in a court of a foreign country, while constituting a good cause of action in a domestic court, does not merge the original cause of action or extinguish the original contract debt, and is therefore no bar to an action thereon in a domestic court, unless it has been paid or satisfied.

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

Action by Lester W. David against Edward F. Swift and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge: In September, 1908, the defendant in error brought an action in a state court of the state of Washington against the plaintiffs in error to recover the sum of $77,500 on a contract of sale of certain shares of stock in a corporation of British Columbia. The cause was removed to the United States Circuit Court for the Western District of Washington on the ground of diversity of citizenship. In that court a supplemental complaint was filed, to which an answer was made, in which the plaintiffs in error set up a counterclaim for $244,291.79, and on September 27, 1909, a reply was filed. After the issues had been made up and the cause assigned for trial, the plaintiffs in error filed a motion to dismiss their counterclaim without prejudice. The motion was allowed, and on the same day the plaintiffs in error asked leave of the court to file a proposed supplemental answer, in which they alleged that prior to the commencement of that action they, as plaintiffs, had commenced an action against the defendant in error in the Supreme Court of the Province of British Columbia, Dominion of Canada, a court of record of common-law jurisdiction in which they had alleged a cause of action which was identical with their counterclaim in the present action, and that the defendant, in answer thereto, had alleged as a counterclaim thereto his demand for $77,500 on which he sued in the present action, and that upon issues so framed in that court the cause had been tried and judgment had been rendered on December 4, 1909, in favor of the said defendant in error herein for $77,500, and dismissing the complaint of the plaintiffs in that action; that thereafter, on December 6, 1909, the plaintiffs in said action took their appeal to the Court of Appeal of British Columbia from so much of said judgment as dismissed their complaint, but that no appeal was taken from the judgment so rendered in favor of the defendant in error on his counterclaim therein; and that subsequently, on the demand of said defendant in error, they gave security to the satisfaction of the registrar for the payment of said judgment in all respects, which security was approved and accepted by the defendant in error, and is now in full force and effect, and in said proposed supplemental answer, the plaintiffs in error prayed that no further proceedings be had or taken in the action, and that the complaint be dismissed. The court denied the application for leave to file the supplemental answer, and thereafter the cause was tried on January 6, 1910, and judgment was rendered in favor of the defendant in error and against the plaintiffs in error for the sum of $86,798.62.

The plaintiffs in error rely upon the assignment that the trial court erred in denying their application for leave to file the supplemental answer, and they contend that the judgment of the court of Canada, which the defendant in error secured upon the same cause of action which he alleged in the present case, should have been held a bar to the further prosecution of the latter action, and that the undertaking given to secure the judgment of the Canadian court should be held equivalent to the payment and satisfaction thereof. A judgment in personam in a court of a foreign country, while it constitutes a good cause of action in a domestic court, does not merge the original cause of action or extinguish the original contract debt, and it is no bar to an action thereon in a domestic court unless it has been paid or satisfied. Australasia Bank v. Nias, 16 Q. B. 717; Trevelyan v. Myers, 26 Ont. 430; New York, L. E. & W. R. Co. v. McHenry (C. C.) 17 Fed. 414; Wood v. Gamble, 11 Cush. (Mass.) 8, 59 Am. Dec. 135; Eastern Townships Bank v. Beebe, 53 Vt. 177, 38 Am. Rep. 665; The Propeller East, 9 Ben. 76, Fed. Cas. No. 4,251; Lyman v. Brown, 2 Curt. 559, Fed. Cas. No. 8,627. In the case last cited Judge Curtis, after referring to the fact that there is some uncertainty concerning some of the effects and force of a foreign judgment, said:

"But there is none as to this particular. It does not operate as a merger of the original

cause of action. The fact that assumpsit lies on a foreign judgment is decisive that the demand has not passed into a security of a higher nature, so as to operate as a technical merger."

No exception to the rule is created by the fact that the supplemental answer in the case at bar shows that security has been given for the payment of the judgment of the Canadian court. If security for the absolute and unconditional payment of the judgment had been voluntarily accepted by the defendant in error, a different case would be presented, for a party may not twice obtain payment of the same demand. But all that was done was to stay the execution of the judgment by means of an undertaking whereby the plaintiffs in error bound themselves to pay the judgment within ten days after the judgment of the Court of Appeal, "unless said judgment be such as to disentitle the defendant to receive such amount." In other words, the undertaking is merely a supersedeas bond on appeal, and is not security for, or satisfaction of, the judgment.

The judgment of the court below is affirmed.

NOTE.—*Distinction Between Judgments of other States and Those of other Countries as Merging Causes of Action.*—The principal case refers to a Canadian judgment, but there are believed to be many cases of judgments of sister states in which it is held that such judgments do effect a *merger*. We cite some of them in the New York case hereinbelow. The cases involving judgments of other states speak generally, but as pointed out in the Vermont case hereinbelow that is how confusion has arisen. The faith and credit clause is claimed to make them *debts of record*, and for that reason *nul tiel record* is the proper plea instead of *non assumpsit*. We cite some of the cases.

In Gray v. Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720, the facts show a suit in New York on a promissory note and "the defense alleged was a merger of said note in a judgment recovered thereon by the payee in a court of Indiana. The issue tried was whether said judgment was procured through the fraud of the maker, the defendant in this action." Notwithstanding that it does not appear there was any dispute about merger, the court said unanimously, through Vann, J., that: "A cause of action is merged in a judgment rendered upon it, not only for the reason that a judgment is of a higher nature, but because it would be vexatious to the one party and of no benefit to the other to permit the recovery of two judgments against the same person for one debt. (Davis v. Mayor, etc., 93 N. Y. 250, 254; Wayman v. Cochrane, 35 Ill. 152; Hogg v. Charlton, 25 Penn. St. 200; Marshall v. Stewart, 65 Ind. 243; Freeman on Judgments, § 215. As a judgment of a court in any state is entitled to full faith and credit in the courts of all the states, it is a merger of the cause of action in every part of the union. (Besley v. Palmer, 1 Hill, 482; Mills v. Duryee, 7 Cranch, 481; Hampton v. McConnel, 3 Wheat. 232).

This case in the Appellate Division of the Supreme Court, was reversed by the court of appeals upon the ground that it had been sufficiently shown so as to make a question of fact for the jury that the judgment pleaded as a merger had been fraudulently obtained, the appellate division holding to the contrary. The opinion in the lower court said: "The appellant does not question the well-settled principle of law that a note upon which a judgment has been obtained is merged in the judgment, so that thereafter an action cannot be maintained on the note itself." Gray v. Richmond Bicycle Co., 58 N. Y. S. 182, 40 App. Div. 506.

In Eastern Townships Bank v. Beebe, *supra*, it was said: "The only question is, whether said Canadian judgments merge the cause of action, in such a sense as to render it incapable of being the subject of a judgment in this suit * * * All the authorities agree that a suit in Vermont, for getting satisfaction of the Canadian judgment, must be an action of assumpsit, counting upon an implied promise, arising from the fact of the existence of such judgment. It is held in the cases that a foreign judgment, when shown in evidence upon a matter within the jurisdiction of the court and in which the court had jurisdiction of the parties, so that they were personally bound by the judgment, in the country where rendered, it is conclusive upon the matter therein adjudicated. But at the same time it is held that the original cause of action is not so *merged* by that judgment that it is incapable of being the subject of a suit in a country foreign to that in which the judgment was recovered. The books are uniform in making the distinction between *merger* of the cause of action and conclusiveness of effect, as a matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same original cause of action. Whatever may be the reason for such distinction, it exists, and is established as a rule of law; and we see no reason for annulling that rule in this state. * * * In the many cases in which the subject of judgments as between the different states of the Union has been discussed and determined, the theory and logic have rested upon the provision of the U. S. Constitution, as to the faith and credit to be given to judgments of one state in the other states; and in all the cases it is assumed that but for such provision, such judgments would not have that faith and credit and would be foreign judgments * * * It is fundamental that a foreign judgment does not constitute a record debt, but it is only *evidence* of obligation to pay. The indebtedness evidenced by a foreign judgment as a cause of action to be declared on, as the ground for recovery is that of *simple* contract and the subject of a suit in assumpsit. In this case then the judgment in Canada as a *cause of action*, is of no higher grade than the notes themselves. * * * The confusion on this subject seems to result from not distinguishing between a domestic judgment as constituting of itself a *debt of record*, and a foreign judgment, which is only evidence of an indebtedness as upon a simple contract."

In Hall v. Odber, 11 East. 118, Lord Ellenborough, and Justices LeBlanc and Bayley, distinguished in the same way between foreign judgments and domestic judgments. In Bank of Aus-

tralasia v. Harding, 9 C. B. 661, Wilde, C. J., said: "In England, the colonial judgment, which stands on the same footing as a foreign judgment, is not a security of a higher nature than the prior simple contract debt. The principle of merger does not apply." It has been called "an agreement on which an action of assumpsit will lie, but does not constitute a debt of a higher order." Smith v. Nicholls, 3 Bing. N. C. 208.

In Freeman on Judg., § 605, we find it said: "The law of merger has never been applied as against the plaintiff in a foreign judgment, and he is, both in England and America, unquestionably entitled to disregard the judgment in his favor and sue upon the original cause of action."

Where the statute of limitations was urged in a suit on a foreign judgment rendered by a justice of the peace, it was said in Evans v. Cleary, 125 Pa. St. 204, 17 Atl. 440, 11 Am. St. Rep. 886, that: "It is not the note or account sued on in the state from which the transcript comes, but the judgment rendered upon it, that is the plaintiff's cause of action, and that is evidenced in the manner required by the act of the assembly. The note or account has been merged in the judgment rendered upon it by the foreign justice, and makes no part of the plaintiff's case." The judgment in this case was foreign, in that it was one of a sister state and not that of a foreign country.

This case is, in general language, opposed to the Beebe case, but, as seen, the judgment was that of a sister state and there was no strict necessity for distinguishing. But it is not concluded necessarily, that, because a foreign judgment does not operate as a merger, therefore the statute of limitations would run from the accrual of the original cause of action. Such judgment might be taken though not sued upon as evidence of a new agreement. Certainly it would be if sued upon. We call attention to what is said in the Beebe case to the distinction between *merger* from, and conclusiveness by, a foreign judgment. The faith and credit clause makes a judgment of a sister state have both effects. In other words, it adds to conclusiveness of effect, a virtue independent of that clause, the effect of a domestic judgment so far as merger is concerned. C.

CORAM NON JUDICE.

A. H. R.

OUR INTRODUCTION.

This column usurps the function of our Jetsam and Flotsam department.

SOCIALISM'S ONE-SIDED LOGIC.

A socialist is a most acute reasoner and a most technical logician when it comes to proving his own case, but when the tables are turned, he often muddies the water and incoherently cries for "justice."

SOCIALISM AND THE LAW.

There is much that we admire in socialism and could easily be persuaded to approve some of its great principles, but we frequently do not like its attitude toward the enforcement of any law which it does not favor. Very properly, does it pour forth the vials of its wrath upon the law-breaking corporation, but its inconsistency becomes too often apparent when it urges resistance to an order of court or the enforcement of a "capitalist-made law," whatever that may mean.

We offer these suggestions in a friendly spirit as we have an earnest desire for the success of much of the propaganda for which conservative socialism stands, but we can readily detect the reaction which every thinking man must experience when he is called upon to become an alarmist and madly rush to a foolish attack upon cherished and sacred institutions.

THE WARREN CASE.

We have been asked by some subscribers to publish the opinion in the case of United States v. Warren, celebrated at present by the fact that 500,000 socialists are holding up Mr. Warren as a martyr to a great principle.

The opinion is on file in St. Louis, the headquarters for the United States Court of Appeals for the Eighth Circuit, and will be published and annotated next week.

A SIMPLE CASE.

We confess that our reading of the Appeal to Reason, which Mr. Warren so ably edits, made the blood of our indignation mount high and fast against the great injustice which was apparently wreaked upon the great editorial apostle of socialism. We therefore strode in mighty wrath to the Court of Appeals and demanded a glance at the nefarious document miscalled an "opinion of a court of justice." We read it and then smiled; smiled at the imaginary monsters we had pictured as judges of the Eighth Circuit Court of Appeals; smiled at the tremendous effect of word pictures when drawn by the master hand of a writer like Mr. Warren. It was really a very simple case.

THE REAL FACTS IN THE WARREN CASE.

Mr. Warren mailed a letter on the outside of which was printed the offer of a reward of $1,000 to anyone who would kidnap Governor Taylor and deliver him to the Kentucky authorities by whom it was alleged he had been indicted. The announced purpose of this offer was to test the question whether there was one law for the rich corporation and another for the poor man.

AN INTERESTING EXPERIMENT.

The experiment which Mr. Warren was making was an absorbing one and we sincerely regret that he blundered in making the experiment so as to vitiate the entire result; because we are certain that if he could have raised the same question in his case which was before the supreme court of the United States in the habeas corpus proceedings of Moyer, Pettibone and Haywood, he would have settled this tremendous issue for all time and surely found that, though there are a few really reactionary judges, the federal judiciary of this country is not "subsidized" nor "capitalist controlled," nor is its integrity so far prostituted that it is ready to mete out one kind of justice to the rich man and another to the poor man.

THE CASE OF MOYER, PETTIBONE ET AL.

The habeas corpus proceedings by the labor leaders of Colorado with which the Warren case is contrasted brought up the simple question that if a nonresident is indicted, the fact that he is kidnapped and brought into the state which indicts him, does not give him the right to demand his release because of the illegal manner of his arrest. That has been the law in criminal cases for many years. It may be a bad rule of law but it is the law until the courts or the people think fit to change it. If Governor Taylor had in fact been kidnapped and brought back to Kentucky he could not have pleaded his illegal arrest as a reason why he should not then be tried or convicted and the Supreme Court would have treated his case no differently than that of the labor leaders of Colorado.

WHERE THE TEST FAILED.

Mr. Warren failed by an excusable blunder which led him to violate a mere regulation of the mails. This allowed the case to go off at a tangent and the main question was not touched. Mr. Warren put his offer of reward for the kidnapping of Governor Taylor on the outside of an envelope instead of inside, and thus violated, according to the decision of the court, Act of Congress, September 26, 1888, making it a criminal offense to knowingly deposit in the mail, matter, upon the envelope or outside wrapper of which, or any post card, upon which is printed or written any language calculated and obviously intended to reflect injuriously upon the character or conduct of another."

A jury found Mr. Warren guilty of violating this statute, under proper instructions from the trial court, and the court of appeals have found no error therein. Hundreds of people have been found guilty of violating this simple and somewhat obscure statutory regulation, and some of them were commercial lawyers who were trying to collect bad debts by threatening and embarrassing declarations, printed or written on the outside of their correspondence. No favoritism, so far as we can discover has ever been shown by the federal courts in enforcing this statute.

While, therefore, we regret that Mr. Warren's interesting effort should have stuck in the bark, it is useless, nay, it is folly, for the friends of Mr. Warren to magnify a clear blunder into a martyrdom. Mr. Warren's case indeed presents an opportunity for executive clemency because of the lack of any vindictive motive on the part of Mr. Warren toward Governor Taylor, and Mr. Warren should accept such clemency if offered. But at all events he should accept the situation gracefully and wait for a further opportunity to test the integrity of the courts from a better vantage point than this case offers to him.

KIDNAPPING PERSONS UNDER INDICTMENT.

One thing the Warren case should do—it should suggest to Congress the advisability of making it a criminal offense against the laws of the United States to kidnap a person wanted for trial or in another state. The federal statutes provide a proper means for extraditing fugitives from justice and all illegal methods of arrest should be sternly discountenanced.

TRESPASS BY AEROPLANE.

In 71 Cent. L. J. 1, this journal discussed "Aviation and Wireless Telegraphy as Respects the Maxims and Principles of the Common Law," and in the following article under the above caption, from the London Law Magazine we get more distinctly the English view on this subject:

"The art of flight has progressed so rapidly, and cross-country flights are of such frequent occurrence, that the question of trespass by flying over a person's land merges from an abstract subject for discussion into a matter of the greatest practical importance. The following observations discuss (1) the proposition that it is an act of trepass merely to fly over a person's land, and (2) the right of a landowner forcibly to eject a trespassing aviator.

(1) To constitute trespass, which may be defined as the wrongful entry upon, or the interference with the possession of the land of another person, proof of entry either actual or constructive is necessary. Constructive entry includes every interference or entry other than actual or physical entry, and it is submitted that, on the existing authorities, the flight by an aviator over the land of another without alighting is a constructive entry, and constitutes an act of trespass.

Cujus est solum ejus est usque at caelum. He who possesses land possesses also that which is above it, but whether the owner of land can maintain an action for trespass against a man who uses the air above his land by flying in an air-machine has been doubted by Lord Ellenborough, but affirmed by Lord Blackburn. In Pickering v. Rudd (1815), 4 Camp. 219, where the defendant nailed to his own wall a board so as to overhang the plaintiff's close, it was held by Lord Ellenborough that an action for trespass would not lie against a man for interfering with the column of air superincumbent on a close, but that the proper remedy for any damage arising from the board overhanging the close would be by an action on the case; otherwise it would follow that an aeronaut would be liable to an action of trespass quare clausum fregit at the suit of the occupier of every field over which his balloon passed in the course of his voyage. Lord Ellenborough's dictum was questioned fifty years later in Kenyon v. Hart (1865), 6 B. & S. 249, 252, wherein Blackburn, J. (as he then was), said: "I understand the good sense of that doubt, though not the legal reason of it"; and it is difficult to see how Pickering v. Rudd is an authority of assistance to the argument that flight over a person's land is not an act of trespass. From the judgment of Lord Ellenborough it is clear that he was of opinion that, although no action of trespass would lie, the proper remedy would have been by an action on the case. It must not be forgotten that this case was decided in the year 1815, when, as was recently observed in the Court of Appeal, the form of an action was of the utmost importance in the eyes of the court, and when there was no machinery by which an action of trespass could be turned into an action on the case. The old distinction between an act which itself occasioned a prejudice and an act a consequence from which was prejudicial, was abolished by the rules of the Supreme Court under the Judicature Acts, and the one action of trespass now covers both an action of trespass and an action on the case.

It is submitted that the occupier of land is

entitled to the free use of the air above his land. Although there is no right to air under the Prescription Act, or as an easement by prescription from the time of legal memory, it has been held that a vestry or a board of works in whom is vested the management and control of the streets situate within their district are entitled to so much of the air above the streets as is compatible with the ordinary user thereof. In Wandsworth Board of Works v. United Telephone Co. (1884), 13 Q. B. D. 904, the defendants suspended from chimneys, telephone wires across a street. An injunction restraining the defendants was granted by Stephen, J., which was dissolved by the Court of Appeal, the ratio decidendi being, not that the air above the surface of the street was not vested in the plaintiffs, but that although the plaintiffs were entitled to so much of the area which was above the surface as was the area of the ordinary user of the street as a street, the suspension of wires from chimneys did not interfere with the ordinary user of the street in question. It is clear from the judgment of Brett, M. R., that he did not question the law as stated by Lord Coke, and that not only the owner of land under a grant is entitled to the free user of the air above the land, but that the word "street" in an Act of Parliament includes the air necessary for the ordinary user of the street.

Moreover, it is common enough to commit trespass by wrongful entry below the ground as by mining, and there seems no reason why wrongful entry above the surface should not similarly constitute an act of trespass. The improbability of actual damage is irrelevant to the pure legal theory, neither is it necessary that there should be force nor unlawful intention; there seems every reason to support the proposition that the mere flight over a person's land is an act of trespass, and that an action would lie against the offending aviator.

(2) The owner of land upon which a trespass is committed is entitled to remove the trespasser, and may use in so doing that degree of force which is necessary to eject the wrongdoer. The right to eject being a remedy whereby the owner of property may assert his rights, the following question may shortly come before the court to be decided.

Acts of trespass to land have been committed by A, flying repeatedly at a level within the height of ordinary buildings over B's land. B, instead of bringing an action for damages, or for a declaration that A is a trespasser, or to restrain him from further acts of trespass, determines to terminate at once the annoyance by exercising his right of ejectment.

It is not easy to see how the owner could enforce his right, except by shooting at the aeroplane with the object either of frightening the aviator away, or of "winging" his machine and compelling the aviator to descend; the question at once arises, would the owner be committing an illegal act, and what would be his liability if the aviator were (a), injured; (b), killed.

(a) It is clear that if B shot at A's aeroplane without warning and without taking any precautions, he would be committing a criminal offence. It may, however, be argued that a prudent course would absolve the owner from any criminal liability arising from the consequences of his act. It may be said that the owner should, in the first place, fire a blank cartridge as an invitation to A, either to fly away or descend, just as a gunboat warns a foreign trawler fishing in prohibited water by firing a blank shot across the bows of the offending craft. If a blank cartridge had no effect, B should, before actually shooting at the aeroplane, fire ball cartridge past the aeroplane, so that the whistling of the bullet through the air might indicate to A that B was seriously determined to compel him to descend. Having taken the above preliminary steps, in addition to the precaution of engaging a skilled marksman and mechanician to shoot at the offending aeroplane, it may be argued that to fire at A's aeroplane would be neither an act of unnecessary violence, nor for that matter, a criminal act at all.

The answer to this argument is that it is a felony punishable with penal servitude for life, unlawfully and maliciously to shoot (or even attempt to shoot) at a person with intent to maim, disfigure, disable, or do any other grievous bodily harm. Although there may be no intent to maim or disfigure, the object of the shooting is to disable the aeroplane, and there is sufficient mens rea, therefore, to constitute the above felony. It is a misdemeanor, also, punishable with five years' penal servitude, unlawfully and maliciously to wound any person, or inflict any grievous bodily harm upon him: and in R. v. Ward, L. R. 1, C. C. R. 356, it was held that a man who fired a gun at a boat with the object of frightening away the occupant, and who wounded him owing to the boat being suddenly slewed round, was rightly convicted of malicious wounding. It does not appear from the report of the case that the prisoner was the owner of the water upon which the boat was, nor that he was enforcing a legal right, but it is not likely that the courts would draw so fine a distinction between this case and that of an owner protecting his property, and therefore the act of shooting at a trespassing aviator, or even merely of pointing a gun which the owner knew to be loaded, would be the commission of a criminal offence, and of an act of unnecessary violence.

(b) If the result of the shooting were fatal, the owner would be guilty of manslaughter, even if it is assumed in his favor that no offence under 24 and 25 Vict. c. 100, has been committed.

It is a principle familiar to all that every criminal offence involves the mental condition of a "vicious will" or "intention," and that there must be some form of mens rea, i. e., the wrongdoer must (1) be able to "help doing" what he does, (2), know that he is doing a criminal act, and (3), every sane adult is presumed to foresee and to intend the natural consequence of his conduct. Assuming that the owner has the right to eject trespassers, and that he has used the only force which can, under the circumstances be used by him, it would be idle for the owner to argue that he did not know that a fatal accident might result, or that it is impossible to foresee such a contingency arising, or that, taking every thing into consideration, such as the care with which he had fired at the aeroplane, and that he had warned the aviator of his intention to shoot, he had not in law intended the natural consequences of his act.

But the opinion has been expressed by Denman, J., in R. v. Prince, L. R. 2, C. C. R. 154, that criminal liability may exist even where there is an intention to do some act which is wrong, even although it does not amount to a crime; whilst Bramwell, B., giving judgment

in the same case, actually went so far as to say that the intention to commit an act only morally wrong was sufficient mens rea.

However much this latter view may be questioned, it is clear that criminal liability exists where there is an intention to commit a crime, even although it is not the particular crime in fact committed, or where there is an intention to do a tortious or wrongful act which yet falls short of a crime. To shoot with fatal result at a trespassing aviator, without warning and without taking precaution, would be manslaughter (assuming always that 24 and 25 Vict., c. 100, does not apply), because the owner intended to commit and did in fact commit an act which was wrong. Neither would the taking of precautions, as suggested above, absolve the owner from liability since every sane adult is presumed to intend the natural consequences of his conduct, and is assumed by law to have the power of foreseeing these consequences. From whatever point the question is approached, it seems clear that the owner would not be able to enforce his right of ejectment, but would be obliged to rest content with his right of action for damages or for a declaration, or for an injunction to restrain further acts of trespass.

In view of the present stage of development arrived at by the science of aviation, the writer ventures to suggest that the landowner has at his command all the remedies he requires, and to express the hope that no landlord will be tempted, should he read this article, to institute proceedings for trespass against an aviator merely for flying over the owner's land."

EDWARD DOUGLAS WHITE, CHIEF JUSTICE.

No president has shown greater capacity for selecting candidates for the judiciary than has President Taft. His appointment of Judge White to be Chief Justice of the United States is no exception to this rule.

Arising far above party and sectional prejudice the president has kept in view solely the requirements of the high office to be filled and has not allowed the vision to become obscured by unworthy considerations.

Justice White's history is well known. When appointed to the Supreme Bench by President Cleveland he had already attained pre-eminence as the leading jurist of the state of Louisiana and was at that time one of its senators in the upper house of the National Congress.

The approval of his appointment as Chief Justice was prompt and without the usual reference to a committee following a senatorial precedent that had been observed on his appointment as Associate Justice.

Justice White will be in no sense an unworthy successor to Marshall, Taney, Chase and other illustrious chief justices and need acknowledge none that have gone before as his superior.

While this may seem like too fulsome praise for a contemporary, it is, nevertheless, true, that Justice White has deserved the splendid encomiums he has already received by reason of the strong, vigorous and perspicuous opinions which have come from his brain and pen.

This appointment together with the appointment of Associate Justice Vandeventer and Lamar will not detract from the uniformly high position which this court has always occupied among the judicial tribunals of the world.

CORRESPONDENCE.

IS THE LAW A LEGAL JUNGLE?

Editor Central Law Journal:

From late reports of the American Bar Association, and the discussions of the last year in the Green Bag, and in the Central Law Journal, it would seem that the hour for reform has struck. The Dean of Harvard Law School informs us that the English Bench, Bar and Law Books are the best. If this is so, what are our overtoppling and unwieldy digests worth? And how much better are our Cycs that fill our offices from floor to ceiling? Is it not up to the law schools to show why they exist? If all of these are so excellent and progressive, then why is the ignorance of the American lawyer "appalling"? (See 34 Am. Bar Assn. Rep. 787).

Can it be the "Case System" is a success; that the digest of old is a new discovery, likewise the Cycs? Wherein are these outputs so progressive, so philosophical and instructive? If they are so, then why is the American lawyer so ignorant and so slothful? Clamorous advertising and discussions of experiments and new theories have brought about a condition, and too, that condition foretold by Joel P. Bishop. This will indicate a phase of the condition:

A student recently said to us: "You told us caveat emptor was a great principle. Now we cannot find it in our school book on Contracts." A busy lawyer looked up from his writing and said to that student: "Those factory books you use are written by the factory office hands and are hawked off on the professors for their schools."

"But," said the student, "they are advertised as the best?"

"Oh, yes," said the lawyer, "but the advertisements of that factory are its dependence. Its book on contracts will prove what I say. You go and tell your professor that a book that does not properly introduce and teach caveat emptor is not fit to be put in a student's hand."

Now we have referred to facts tangible to all, also a colloquy in a law office, now what do these facts speak? How can the law school and the book factory withstand such assaults?

In the light of facts any friend of the student, the schools of the lawyer and of his literature should speak out. More letters are needed like those of Edward D'Arcy in the Central Law Journal. Let there be light in the "jungle."

Sincerely yours,
GLENWAY MAXON.

Milwaukee, Wis.

HUMOR OF THE LAW.

Figg—"Talking about pugilism and state laws, did you ever notice it?"

Fogg—"Ever notice what?"

Figg—"That there's no law to prohibit fighting in the state of matrimony."—Boston Transcript.

Magistrate (in police court)—How is it that I see you every month?

Rastus Johnsing—I guess 'cos yo' only gibs me thirty days at a time.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Affidavits**—Denial in Jurat.—The officer who signed the jurat to an alleged affidavit held competent to testify that the affidavit was not sworn to.—Green v. Rhodes, Ga., 68 S. E. 1090.

2. **Arson**—Indictment.—In a prosecution for arson, in which the information charged the burning of several buildings, proof of defendant's burning all of them held not necessary to convict.—People v. Stewart, Mich., 127 N. W. 816.

3. **Attachment**—Lien.—One who purchases at a sale under an attachment levied subsequent to a transfer of the property by the attachment debtor held not protected against such transfer. Bliss v. Tidrick, S. D., 127 N. W. 852.

4. **Attorney and Client**—Contingent Fee.—Without express provision an agreement for an attorney's contingent fee does not act as an assignment of a part of the claim, and no interest in a future recovery exists without an assignment.—Plummer v. Great Northern Ry. Co., Wash. 110 Pac. 989.

5.——Revocation of Authority.—An attorney is but a representative whose authority is revokable at his client's will, though a contingent fee be agreed upon.—Plummer v. Great Northern Ry. Co., Wash., 110 Pac. 989.

6. **Bankruptcy**—Act of.—Payment of a debt by a bankrupt to his wife while insolvent held to constitute an act of bankruptcy subjecting him to adjudication.—In re Pinson & Co., D. C., 180 Fed. 787.

7.——Composition.—Proof of a creditor's objection to a composition that the bankrupt had obtained goods on credit pursuant to a false written financial statement held to preclude the confirmation.—In re Griffin, D. C., 180 Fed. 792.

8.——Composition.—A composition of a bankrupt partner of a bankrupt firm individually cannot be affected by the consent of firm creditors without the consent of a majority in number and amount of the individual creditors.—In re Ullman, D. C., 180 Fed. 944.

9.——Consent.—When involuntary bankruptcy proceedings are instituted against a corporation within the classes specified by Act Cong. Feb. 5, 1903, its passage of a resolution consenting to an adjudication operated to make the proceedings voluntary in substance.—In re New Amsterdam Motor Co., D. C., 180 Fed. 943.

10.——Construction.—The Act Cong. June 25, 1910, was not intended to be retroactive.—In re New Amsterdam Motor Co., D. C., 180 Fed. 943.

11.——Discharge.—A discharge does not release a bankrupt from liability for obtaining property by false pretenses or false representations.—Atlanta Skirt Mfg. Co. v. Jacobs, Ga., 68 S. E. 1077.

12.——Expenses.—Expense incurred by a trustee in bankruptcy in caring for real estate which is subject to valid mortgages is presumed to be for the protection of the supposed interest of general creditors, and unless the mortgagees expressly or by necessary implication assent to such expenditures they cannot, in general, be charged with them.—In re Vulcan Foundry and Machine Co., 180 Fed. 671.

13.——Interest.—A creditor holding security liquidated after the filing of the bankruptcy petition is entitled to interest on his claim, where the proceeds of the security is inadequate to pay the face of the claim.—In re Klessler, 180 Fed. 979.

14.——Landlord and Tenant.—Whether a landlord is entitled to priority in bankruptcy for rent accrued prior to adjudication, depends on his right to priority under the state law.—In re Southern Co. of Baltimore City, D. C., 180 Fed. 838.

15.——Partnership.—A partnership must be in existence as an actual status or its affairs must be still unsettled in order to subject it to bankruptcy adjudication.—In re Pinson & Co., D. C., 180 Fed. 787.

16.——Pleadings.—Where a bankrupt failed to file a petition for a discharge within twelve months after adjudication and within the next succeeding six months, and did not apply for, or obtain an extension of time, his right to a discharge was barred.—In re Levenstein, D. C., 180 Fed. 957.

17.——Preference.—A preferred creditor of a bankrupt, after the bankruptcy court has declared void the preferential payments received by him, may file a claim in such court for the amount thereof, without having the validity of the preference determined in another tribunal.—In re John A. Baker Notion Co., D. C., 180 Fed. 922.

18.——Voidable Sale.—Where, after adjudication and before the election of a trustee in bankruptcy, the majority stockholders of a corporation in which the bankrupt was interested, sold all its assets, to the prejudice of the bankrupt's estate, the sale was voidable by the trustee suing in equity as a stockholder.—Greenhall v. Carnegie Trust Co., D. C., 180 Fed. 812.

19. **Bills and Notes**—Notice.—It is a defense to an action on a check by an indorsee that, before paying anything for it, he had notice of want of consideration for it.—Bank of Saluda v. Feaster, S. C., 68 S. E. 1045.

20. **Boundaries**—Estoppel.—Where a dividing line is established between property owners and they have occupied with reference thereto, the party establishing the line and his successors are estopped from questioning its correctness.—Small v. Robbins, Nev., 110 Pac. 1128.

21. **Carriers**—Limitation of Liability.—A carrier of freight by a fair and reasonable contract can limit his common-law liability as an insurer.—Larson v. Oregon Short Line R. Co., Utah, 110 Pac. 983.

22.——Perishable Freight.—A carrier was not liable for injuries to peaches due to natural deterioration while in its possession, though without fault of the consignees.—Pennsylvania R. Co. v. Goetchius & Caperton, Ga., 68 S. E. 1110.

23.——Reasonable Care.—A carrier need not assist a passenger in alighting, but, when a brakeman undertakes to assist a passenger to alight, he must exercise reasonable care.—Louisville & N. R. Co. v. Lee, Ky., 130 S. W. 813.

24.——Negligence.—The Salvation Army is not relieved from liability for the negligence of its agents or servants in the construction of a runway from its building causing injury to a licensee of the premises to make repairs.—Hordern v. Salvation Army, N. Y., 92 N. E. 626.

25. **Chattel Mortgages**—Possession of Property.—A chattel mortgagee in possession under a transfer by the mortgagor held entitled to his possession and title a against a creditor of the mortgagor subsequently levying an attachment on the property.—Urquhart v. Coss, Wash., 110 Pac. 1001.

26.——Validity.—A chattel mortgage not invalidated by including articles not subject to mortgage.—Old Settlers' Inv. Co. v. White, Cal., 110 Pac. 922.

27. **Commerce**—Intoxicating Liquors.—Intoxicating liquors being articles of commerce so far as the interstate commerce law is concerned, no state can prohibit their introduction within its borders.—United States v. United States Express Co., D. C., 180 Fed. 1006.

28.——Sales.—Sales of goods by a corporation without the state to a resident of the state, though made through traveling salesman, held to constitute interstate commerce, not subject to prohibition or regulation by the state.—Imperial Curtain Co. v. Jacob, Mich., 127 N. W. 772.

29. **Conspiracy**—Trades Unions.—Picketing and patrolling by union employees are lawful when not accompanied by violence and intimidation, but not when in aid of an unlawful object.—Schwarcz v. International Ladies' Garment Workers' Union, 124 N. Y. Supp. 968.

30. **Constitutional Law**—Classification.—The classification of governmental powers as legislative, executive, and judicial is not exact, since administrative and executive officers are often required to exercise judgment and discretion without necessarily exercising judicial power contrary to the Constitution in doing so.—People v. Joyce, Ill., 92 N. E. 607.

31.——Dangerous Employment.—Laws 1910, c. 674, Imposing a liability on employers operating dangerous employments and including railroads for injuries to servants, independent of the employer's negligence, held not unconstitutional as denying railroads the equal protection of the laws.—Ives v. South Buffalo Ry. Co., 124 N. Y. Supp. 920.

32. **Contracts**—Indemnity Bond.—A bond of indemnity to sureties on a bail bond is not against public policy.—Essig v. Turner, Wash., 110 Pac. 998.

33.——Waiver.—Waiver of a forfeiture, once made, cannot be recalled.—Williams v. Empire Mut. Annuity & Life Ins. Co., Ga., 68 S. E. 1082.

34. **Corporations**—Capital Stock.—Where a corporation illegally reduced its capital stock, and did business upon the new basis for a year with knowledge of a nonconsenting stockholder, held, that he could not sue to recover a subsequent dividend, basing his recovery upon the amount of his stock unreduced; no proceeding having been instituted to set aside the illegal action of the corporation.—Woodruff v. Columbus Inv. Co., Ga., 68 S. E. 1103.

35.——Dividends.—A division of profits of a corporation is a "dividend," though not called or considered such by the directors or stockholders.—Barnes v. Spencer & Barnes Co., Mich., 127 N. W. 752.

36.——Representations as to Solvency.—Where a seller makes an affirmation as to the financial condition of a corporation, and stock therein is bought on the strength of it, the absence of any scienter on the part of the seller does not affect the purchaser's right to recover for breach of the warranty.—Iler v. Jennings, S. C., 68 S. E. 1041.

37.——Rescission.—A buyer held not entitled to a rescission for fraud, where incapable of tendering restoration.—Primeau v. Granfield, 180 Fed. 847.

38.——Torts.—A corporation held liable for torts committed by agent in the course of his employment, although the act is done wantonly and recklessly or against the express orders.—Moore v. Atchison, T. & S. F. Ry. Co., Okla., 110 Pac. 1059.

39. **Courts**—Stare Decisis.—Decisions of courts of last resort will not become stare decisis until published and are of such long and uncnallenged standing that they may reasonably be presumed to have become publicly known.—Herron v. Whiteley Malleable Castings Co., Ind., 92 N. E. 555.

40. **Criminal Law**—Evidence.—In a prosecution for robbery, evidence of another crime was admissible when it tended to show that defendant had attempted to induce the prosecuting witness not to prosecute him.—People v. Mack, Cal., 110 Pac. 967.

41.——Jeopardy.—Jeopardy had not attached when the jury were discharged after the state had rested and two witnesses had been examined for accused, because of the misconduct of a juror.—People v. Sharp, Mich., 127 N. W. 758.

42.——Judicial Notice.—The court takes judicial notice of the fact that common beer is a malt liquor.—Flanders v. Commonwealth, Ky., 130 S. W. 809.

43.——Jurisdiction.—Where the evidence shows without conflict that the defendant is within an exemption from the penal provisions of a statute the court has no jurisdiction to convict.—Ex parte Davis, Nev., 110 Pac. 1131.

44.——Prosecuting Attorney.—While it is the duty of a prosecuting attorney to prosecute fairly and impartially, yet it is discretionary with him as to what witnesses he will summon, and he may withdraw a subpoena for witnesses that he may deem of no value to the prosecution.—People v. Johnson, Cal., 110 Pac. 965.

45. **Deeds**—Construction.—Words of doubtful meaning are to be construed as creating a condition subsequent, rather than one precedent.—Phillips v. Gannon, Ill., 92 N. E. 616.

46. **Divorce**—Jurisdiction.—Where the record of a foreign divorce judgment is corrected by inserting a recital of defendant's personal appearance, full faith and credit will be given to the judgment in New York.—In re Higgins, 124 N. Y. Supp. 1005.

47. **Eminent Domain**—Streets.—The use of streets by street railways held not to impose an additional servitude thereon.—Barsaloux v. City of Chicago, Ill., 92 N. E. 525.

48. **Equity**—Bill of Review.—To justify a bill of review on the discovery of new matter, it must appear not only that the matter is new, but that the party could not have known thereof before the trial by the use of reasonable diligence.—Richards v. Shaw, N. J., 77 Atl. 618.

49.——Clean Hands.—The iniquitous conduct which will bar a suitor in equity need not be directed against the defendant, but must be such that the prosecution of the suitor's rights will of itself involve the protection of wrongdoing.—Primeau v. Granfield, 180 Fed. 847.

50. **Estoppel**—Silence.—One standing by and interposing no objection to the sale of his property as the property of another, held estopped thereafter from asserting his right, and has no property in the funds realized from the sale.—Allen v. Lott-Lewis Co., Ga., 68 S. E. 1073.

51. **Evidence**—Insurance.—A life policy, acknowledging receipt of the first premium on its face where the premium was not in fact paid, may be explained.—Williams v. Empire Mut. Annuity & Life Ins. Co., Ga., 68 S. E. 1082.

52. **Fixtures**—Machinery.—Machinery placed on mining claims by a purchaser thereof held not subject to attachment by a creditor of the purchaser while the purchase price of the claims remained unpaid.—Conde v. Sweeney, Cal., 110 Pac. 973.

53. **Foreign Corporations**—Isolated Transactions.—Isolated transactions do not constitute carrying on business by a foreign corporation.—Hunter W. Finch & Co. v. Zenith Furnace Co., Ill., 92 N. E. 521.

54.——Liability of Stockholders.—The rule fixing the liability of stockholders of a corporation formed in one state to do business in another held to apply whether the corporators intend to do all or only a part of their business in such state.—Thomas v. Wentworth Hotel Co., Cal., 110 Pac. 942.

55. **Fraud**—Concealment.—If a person who may keep silent volunteers information which may influence another, a partial statement of the truth becomes a fraudulent concealment.—Gidney v. Chapple, Okl., 110 Pac. 1099.

56. **Fraudulent Conveyances**—Deed on Mortgage.—Actual participation in fraud by both grantor and grantee held necessary to avoid a deed, absolute on its face, intended as security for a debt.—Hutchinson v. Page, Ill., 92 N. E. 571.

57. **Gaming**—Suit for Money Lost.—Where one loses money at a gambling device and settles for the loss afterwards by a check, held, that the loss was at the time of the play for which the loser could recover.—Mann v. Gordon, N. M., 110 Pac. 1043.

58. **Grand Jury**—Control by Judge.—The evidence that shall be received before a grand jury is not subject to judicial control.—In re Kittle, 180 Fed. 946.

59.——Recall of.—The court may, during the term, recall the same grand jury that it had discharged.—State v. Heft, Iowa, 127 N. W. 830.

60. **Homestead**—Adopted Child.—A child adopted by the head of a family, held a beneficiary to an existing homestead which had been set apart to the adopter.—Hilliard v. Hilliard, Ga., 68 S. E. 1110.

61.——Termination.—Where a homestead exemption has ceased to exist as to all children but one born after the homestead was set aside, the widow, for use of herself and such child during its minority, may recover possession of the land from which they have been unlawfully evicted.—Hughes v. Purcell, Ga., 68 S. E. 1111.

62. **Husband and Wife**—Alienation of Affections.—The parents of a husband by reason of their natural obligation to him may counsel him in all matters as to the welfare of him and his wife, without making themselves liable to the wife for alienation of affections, if they act in good faith.—Heisler v. Heisler, Iowa, 127 N. W. 823.

63.——Separate Allowance.—A valid agreement may be made between husband and wife, contemplating separation, for a separate allowance to the wife.—Melton v. Hubbard, Ga., 68 S. E. 1101.

64. **Indemnity**—Suit for.—Action on a strict indemnity obligation will not lie till damage is suffered.—Hilliard v. Newberry, N. C., 68 S. E. 1056.

65. **Indians**—Non Intercourse Act.—The Oklahoma enabling act, held to render the non-intercourse act, forbidding the introduction of intoxicating liquors into Indian Territory non-enforceable on the admission of Oklahoma as a state in so far as it attempted to prevent the shipment of liquor into that part of Oklahoma formerly known as Indian Territory in interstate commerce.—United States v. United States Express Co., 180 Fed. 1006.

66. **Indictment and Information**—Exceptions.—In an indictment or criminal complaint it is not necessary to allege that defendant is not within an exception specified in the statute.—Ex parte Davis, Nev., 110 Pac. 1131.

67. **Injunction**—Change of Possession.—Generally a preliminary injunction will not lie to change the possession of land, where the title is in dispute.—Flood v. E. L. Goldstein Co., Cal., 110 Pac. 916.

68.——Unfair Competition.—Defendant's obtaining from a former driver of plaintiff, and using, a list of plaintiff's customers, held unfair competition, which will be enjoined.—Witkop & Holmes Co. v. Great Atlantic & Pacific Tea Co., 124 N. Y. Supp. 956.

69. **Innkeepers**—Intoxicated Persons.—An innkeeper held not liable for damages for refusal to receive and furnish accommodations to intoxicated, boisterous, and objectionable characters, or to violators of the criminal laws of the states.—Nelson v. Boldt, 180 Fed. 779.

70. **Insurance**—Construction.—A fire policy executed on a printed form prepared by insurer must be strictly construed against the insurer and liberally in favor of insured.—Burbank v. Pioneer Mut. Ins. Ass'n., Wash., 110 Pac. 1005.

71.——Defense.—Where a policy has been delivered and the premium paid with full knowledge of all facts, it would be a fraud upon insured to permit the insurer to avoid the policy after a loss by urging its invalidity at its inception because of stipulations contained therein.—Leisen v. St. Paul Fire & Marine Ins. Co., N. D., 127 N. W. 837.

72.——Delivery.—Where a life policy is delivered to insured, and a note taken for the first premium, the insurance becomes effective upon delivery of the policy.—Williams v. Empire Mut. Annuity & Life Ins. Co., Ga., 68 S. E. 1082.

73.——Premium Note.—Insurance Law, requiring notice of the maturity of premiums, held inapplicable to the maturity of a premium note. —Bartholomew v. Security Mut. Life Ins. Co., 124 N. Y. Supp. 917.

74.——Unearned Premium.—Holders of policies void for want of power of the insurance company to issue them on the company's insolvency held entitled to a return of the unearned premium.—In re Citizens' Mut. Fire Ins. Co. of Holly, Mich., 127 N. W. 769.

75. **Intoxicating Liquors**—Action Against Saloonkeeper.—In an action against a saloonkeeper for personal injuries resulting from the sale of liquors, held necessary only to prove that intoxication caused by such traffic contributed to plaintiff's injuries.—Smith v. Lorang, Neb., 127 N. W. 873.

76.——Injunction.—Injunction is the proper remedy to prevent the illegal acceptance of liquor bonds and issuance of licenses by a village.—Village of Wolverine v. Cheboygan Circuit Judge, Mich., 127 N. W. 744.

77.——Medicinal Compound.—Whether a particular mixture containing alcohol is a medicinal compound and unfit for use except in medicinal doses is generally a question of fact.—People v. Sharrar, Mich., 127 N. W. 801.

78.——Unlawful Sale.—In the trial of a druggist for unlawfully selling intoxicating liquors, evidence of an unlawful sale made in accused's absence by his clerk was admissible.—Walters v. State, Ind., 92 N. E. 537.

79. **Judgment**—Jurisdiction.—Where a judgment was rendered by the Circuit Court without jurisdiction, such court could vacate the judgment after the term and after the time to appeal had expired.—Pollitz v. Wabash R. Co., 180 Fed. 950.

80.——Jurisdiction.—The remainderman of an interest in land held not concluded by the judgment in partition proceedings to which he was not a party.—Vick v. Tripp, 68 S. E. 1067.

81.——Tort Feasors.—A plaintiff in an action of tort may sue as many defendants as he may choose, receiving judgment against only those that prove guilty.—Pecararo v. Halberg, Ill., 92 N. E. 600.

82. **Landlord and Tenant**—Rescission.—Right of rescission of a lease held to be in the tenant, and not in the tenant's sureties.—Taylor v. Dinsmore, 124 N. Y. Supp. 936.

83. **Libel and Slander**—Defamation of Dead. —The malicious defamation of the memory of the dead is an affront to the general sentiments of morality and decency, and though the interests of society demand its punishment, the law does not contemplate the offense as causing any special damages to another individual, though related to the decedent.—Skyrocki v. Stahl, Cal., 110 Pac. 957.

84.——Justification.—For a plea of justification to be a defense to a libel action it must possess great certainty of averment and must justify the sting of the very charge alleged, and it is not permissible to set up a charge of the same general nature but distinct as to the particular subject.—Bodine v. Times-Journal Pub. Co., Okl., 110 Pac. 1096.

85. **Limitation of Actions**—Public Rights.— Limitations may be interposed to all actions by municipal corporations to enforce mere private rights, but it is no defense to those involving public rights.—City of Chicago v. Dunham Towing & Wrecking Co., Ill., 92 N. E. 566.

86. **Mandamus**—Laches.—Laches is applicable to mandamus, and the defense based on lapse of time need not be pleaded to be available.— Preston v. City of Chicago, Ill., 92 N. E. 591.

87.——Compensation Act.—Masters employing workmen in dangerous occupations may be made insurers to some extent of the safety of their workmen by legislative action.—Ives v. South Buffalo Ry. Co., 124 N. Y. Supp. 920.

88.——Liability Act.—Where a fireman on a train carrying both interstate and intrastate commerce was killed, his widow was not limited to suit under the federal employer's liability act, but was also entitled to sue under a state law not in conflict therewith.—Troxell v. Delaware, L. & W. R. Co., 180 Fed. 871.

89.——Safe Place to Work.—Railway bridge contractors are bound to furnish a workman with a reasonably safe place in which to work. —Campbell v. Jones, Wash., 110 Pac. 1083.

90. **Mechanics' Liens**—Bond of Contractor.— Sureties on a bond to save property from mechanics' liens given, held not entitled to defeat a recovery because the principal did not sign the bond.—Daman v. Chamberlain, Okl., 110 Pac. 1056.

91.——Lienable Items.—In an action to enforce a mechanic's lien, the identity of the materials which went into the improvements must be shown.—Wilson, Reheis, Rolfes Lumber Co. v. Ware, Mo., 130 S. W. 822.

92. **Money Paid**—Voluntary Payment.— Money voluntarily paid out by one for another cannot be recovered back.—In re Rider, 124 N. Y. Supp. 1001.

93. **Mortgages**—Gift.—A mortgage intended as a gift held to have no valid consideration.— Welch v. Graham, 124 N. Y. Supp. 945.

94. **New Trial**—Newly Discovered Evidence. —Newly discovered evidence, though impeaching, held ground for new trial, where it would probably lead to a different result.—Sisters of Order of St. Joseph v. Farrell Heating & Plumbing Co., Ga., 68 S. E. 1074.

95. **Nuisance**—Abatement.—A person may erect a dangerous structure thereon, if persons not entering upon the property are in no danger from it, in which case they cannot abate it as a nuisance.—Kilts v. Board of Sup'rs. of Kent County, Mich., 127 N. W. 821.

96. **Partnership**—Actions.—A partner suing in his own name on a firm's claim held required to allege and prove an assignment by the copartner of his interest in the claim.—Levins v. Stark, Or., 110 Pac. 980.

97. **Patents**—Corporation.—A corporation organized by a patentee, who subscribed for two-thirds of the stock and paid for it with money received from another corporation to which he

assigned the patent, is bound by his estoppel, and cannot question the validity of the patent, nor introduce evidence to so limit its construction as to render it worthless.—Automatic Switch Co. v. Monitor Mfg. Co., 180 Fed. 983.

98.——Equipments.—The claims of a patent of a pioneer invention are entitled to some liberality in the application of the doctrine of equivalents.—American Pneumatic Service Co. v. Snyder, 180 Fed. 712.

99.——Patentability.—Use of a different material involves invention if it produces a useful result, increased efficiency, or a decided saving in operation.—George Frost Co. v. Samstag, 180 Fed. 739.

100. **Payment**—General Denial.—Where an action is merely for an alleged existing balance due at the beginning of suit, without reference to the extent or amount of original liability, evidence of payment is admissible under the general denial.—Jones v. El Reno Mill & Elevator Co., Okl., 110 Pac. 1071.

101. **Principal and Agent**—Punitive Damages.—Punitive damages held not to be allowed against the principal, unless he participated in the wrongful act of his agent, expressly or impliedly, by conduct authorizing it or approving it before or after its commission.—Moore v. Atchison, T. & S. F. Ry. Co., Okl., 110 Pac. 1059.

102. **Principal and Surety**—Construction.—Sureties are not "favorites of the law"; their contracts being binding the same as other contracts.—Becovitz v. Sapperstein, Ind., 92 N. E. 551.

103.——Surety Company.—Contracts of so-called surety companies held to be construed most strictly in favor of the obligee.—Young v. American Bonding Co. of Baltimore, Pa., 77 Atl. 623.

104. **Railroads**—Joint Tort Feasors.—A railroad company and its engineer may be jointly sued for negligent homicide, where the negligence of the company results solely from the act of the engineer.—Southern Ry. Co. v. Harbin, Ga., 68 S. E. 1103.

105. **Rape**—Evidence.—In a prosecution for assault with intent to rape, it is proper to prove a complaint made by prosecutrix, but not the detailed statement, nor the name of the person charged.—Pulley v. State, Ind., 92 N. E. 550.

106. **Religious Societies**—Expulsion From.—The governing body of an incorporated church has no power arbitrarily to expel members, where property rights are involved.—Holcombe v. Leavitt, 124 N. Y. Supp. 980.

107. **Removal of Causes**—Separable Controversy.—Where more than one defendant had been joined and a joint cause of action has been stated against them, one of them cannot question the good faith with which the others have been joined, though such joinder appear to be for the purpose of preventing a removal to the federal court.—Bageans v. Southern Pac. Co., 180 Fed. 887.

108. **Sales**—Insolvency.—A false representation may consist in the purchasing of goods with no present purpose of paying for them, and in contemplation of a fraudulent insolvency.—Atlanta Skirt Mfg. Co. v. Jacobs, Ga., 68 S. E. 1077.

109.——"More or Less."—The qualifying words "more or less" merely provide against slight and accidental variations in number, measure, or weight.—Hills v. Edmund Peycke Co., Cal., 110 Pac 1088.

110.——Notice of Equity.—Though one buys property with notice of a latent equity in a third person, he is entitled to avail himself of the rights of his vendor, if the vendor was a bona fide holder without notice, and takes the property free from such equity.—Old Settlers' Inv. Co. v. White, Cal., 110 Pac. 922.

111.——Rescission.—An order by a buyer to his banker not to pay a check drawn by him in payment for goods sold to him will not of itself work a rescission of the contract of sale.—Seldomridge v. Farmers' & Merchants' Bank, Neb., 127 N. W. 871.

112.——Warranty.—Any distinct assertion or affirmation of quality made by the owners to effect the sale of a chattel, and which does effect it, is a warranty, whether the word "warranty" is used or not.—Iler v. Jennings, S. C., 68 S. E. 1041.

113. **Statutes**—Special Legislation.—The statute allowing a counsel fee in an action for libel in force at the time of the adoption of the present Constitution is not objectionable as special legislation in violation of the present Constitution.—Skyrocki v. Stahl, Cal., 110 Pac. 957.

114. **Telegraphs and Telephones**—Common Carriers.—Public telephone lines held common carriers, and telephone companies must supply the applicants with telephone facilities without discrimination.—Home Telephone Co. v. North Manchester Telephone Co., Ind., 92 N. E. 558.

115. **Tenancy in Common**—Alienation.—A tenant in common, who conveyed a specific part of the land, more than an equivalent of his share, held estopped to claim any interest in the land against his grantee, to whom the other tenants thereafter sold their interests.—Pate v. Berry, Ky., 130 S. W. 815.

116. **Trial**—Conjecture Cause.—The jury will not be permittted to guess as to which of two equally probable causes produced an accident, for one of which causes only there was a legal liability—Gibbons v. Lehigh Valley R. Co., 124 N. Y. Supp. 932.

117. **Trusts**—Constructive.—A constructive trust can be decreed on account of breach of a verbal agreement of the purchaser at a judicial sale to purchase for the benefit of the judgment debtor only when proof of the agreement is clear and satisfactory.—Harras v. Harras, Wash., 110 Pac. 1085.

118.——Husband and Wife.—A trust held to arise in favor of the wife where a husband uses her money to pay for land, taking title in his own name, as against the husband's creditors, unless credit was given the husband from the record title.—Johnson County v. Taylor, Neb., 127 N. W. 862.

119.——Substitution of Trustee.—A trustee may not abandon the trust and substitute another in his place as trustee without the consent of the beneficiary, but he must proceed in the execution of the trust, and cannot terminate it by act or default.—Anderson v. Phegley, Or., 110 Pac. 975.

120. **Vendor and Purchaser**—Quitclaim Deed.—A grantee under a quitclaim deed cannot be a bona fide purchaser, but can take only the interest his grantor had.—Backus v. Cowley, Mich., 127 N. W. 775.

121.——Time of Essence.—Where time was originally of the essence of a contract to convey, but for sufficient cause forfeiture for default therein has been waived, time ceases to be essential, and becomes only material thereafter until the vendor makes it essential by proper notice and demand.—Boone v. Templeman, Cal., 110 Pac. 947.

122. **Wills**—Construction.—Under a will, testator's grandchildren held to take a vested remainder, so that a deed from one of testator's daughters who took a life estate to her son and a deed from him back to her did not vest the fee in her.—Pingrey v. Rulon, Ill., 92 N. E. 592.

123.——Costs.—When it is necessary to appeal to the court for a construction of the will, the costs should be borne by the fund.—Kendall v. Taylor, Ill., 92 N. E. 562.

124. **Waters and Water Courses**—Latent Ambiguity.—A mistake which may not be cured, and not a latent ambiguity, held to arise where one devises land in the "N. W." ¼ of section 12 and the "North-west" ¼ of section 9, and it appears he did not own such land, but the "N. E." ¼ of section 12, and the "South-west" ¼ of section 9.—Graves v. Rose, Ill., 92 N. E. 601.

125.——Prescription.—The prescriptive right to the use or flow of water may be qualified as to times, seasons, and mode of enjoyment by the character of the use from which the right has originated.—Ely v. State, N. Y., 92 N. E. 629.

126. **Wills**—Presumption of Sanity.—Where nothing appears to the contrary, witnesses to a will may assume that testator is sane, and has testamentary capacity.—Mordecai v. Canty, S. C., 68 S. E. 1049.